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MARRIAGE IN ROMAN LAW.

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Monogamy was, among the Romans, a traditional custom, ordained by the positive law: *Neminem, qui sub dicione sit Romani nominis, binas uxores habere posse vulgo patet, cum et in edicto praetoris huiusmodi viri infamia notati sint. Quam rem competens iudex, inultam esse non patietur.* (Cod. 5, 5, 2.)

In Roman Law, marriage is a status created by a simple private agreement. Its validity results from this understanding and is absolutely independent of the betrothal which ordinarily precedes, of physical cohabitation (*nuptias non concubitus, sed consensus facit*, says Ulpian in the *Digest*), of the festivities or of the religious ceremony by which it may be accompanied; it is finally independent of any settlement which confirms the pecuniary terms of the union and serves as its evidence. However, according to the opinion of many authors, Roman marriage, even of the last period, was never formed simply by the mere exchange of consents; it presupposed a mode of living characterized by public acts of various kinds. That the concordant wills alone did not suffice is, in the first place, shown by the fact, that marriage may take place outside of the presence of the future husband, providing the bride should be brought to his house; finally, and above all, it could not take place in the absence of the bride, since in this case she could not possibly be at the husband's disposal. "It is an old controversy," writes Friedberg, whether the *deductio in domum*, was an essential of marriage or only ranked as a proof of the matrimonial tie, and consequently constituted an optional ceremony. Both views have been advocated, yet, according to the better opinion, the ceremony of the

deductio in domum was only an optional one. However, the sole fact of its being questioned represents the ceremony as a result of an old custom never omitted, whatever the parties might have thought about its legal value."

On the other side, according to the French jurist, Ortolan, Roman marriage ranks amongst the *real contracts*; it has no existence, if not accompanied by a *traditio*.¹ Then arose in Roman Law, as in all similar systems, the difficulty: how to distinguish marriage from an irregular union, in its two forms of *concubinatus* and mere *concubinage*. The answer was that marriage implied the intention of the husband to have a legal wife, to raise her to his rank, to make her his equal, and the corresponding intent of the wife; this was called the *affectio maritalis*. So is explained the famous Roman definition of marriage, which shows how much the Roman wife shares the religious and civil status of her husband: *individua vitae consuetudo, consortium omnis vitae, divini atque humani juris communicatio*.

The quality of rank between the parties was, in the aristocratic society of Romans, the peculiar characteristic of marriage. Through this essential element it was made distinct from a mere cohabitation. In modern society on the contrary, marriage being either indissoluble or dissoluble in certain exceptional cases, its characteristic is permanency, a perpetuity complete or relative, which distinguishes and severs the legal union from any irregular cohabitation.

The Roman law recognized two kinds of marriages:

1) *Ex jure civili*, that is, the *matrimonium justum* (Gaius, I, 76), *legitimum* (Dig. I, 5, 24), *jure contractum* (Ulp. V, 10); in other words, the *justae nuptiae*; they alone producing the civil effects of marriage.

2) *Ex jure gentium*, that is, the *matrimonium injustum* or *non legitimum*, contracted between persons not possessing the *conubium*.

In such case, the children followed the condition of the mother and the wife never became *uxor*. Marriage was equally unlawful, in the absence of the paternal consent, but Paulus informs us that these marriages were nevertheless indissoluble. Public order and general interest were the reasons for maintain-

1. Paul-Frederic Girard, *Manuel élémentaire de droit romain*, p. 151, (4th edit.); Friedberg, *Das Recht der Eheschliessung in seiner geschichtlichen Entwicklung*, p. 5; Ortolan, *Le mariage, chez les Romains, était-il formé par le seul consentement des parties ou par la tradition de la femme? Explication de la loi 66 du Digeste, de donationibus inter virum et uxorem. Thémis v. X.*, p. 496.)

ing their validity (*Sent. lib. 19, § 2*). Absence of the paternal consent was therefore a purely prohibitive impediment, if this expression may be used in Roman law.² The term *justa uxor* can have two meanings: sometimes as synonymous with *legitima*, sometimes as synonymous with *solemnis*. Wives *sine aqua et igni* are *legitimae*, but they are not *justae* under the operation of the ceremony. They are then *justae* in the first sense, but not in the second.

Actual marriage was indicated by three different expressions. First, *conjugium*, that is, a mutual engagement *quasi commune jugum*.

Second, *justae nuptiae*, the nuptials, from *nubere*, an expression which recalls the veil with which, during the ceremony, the bride concealed her modesty from the eyes of the curious.

Third, *matrimonium*, a term which summarizes all the philosophy of marriage, in recalling to the married couple their respective duties (*matris munus*).

Would you know, says Quintilian, what we call the nuptials? See this young girl whom her father has given to her husband and who walks in festive apparel, surrounded by the crowd. (*Declam. 306.*)

From *matrimonium*, we should distinguish; First, *concubinatus*, a union authorized under Augustus from the *leges Julia et Poppia*, between persons of unequal condition, provided the man had no *uxor*.

The *concubina* was neither *uxor* nor *pellex*, but *uxoris loco*.

The children, issue of such a union, are neither *legitimi* nor *spurii*, but *naturales*. (*Cod. 5, 27.*)

Second, *contubernium* is the perfectly regular and valid relation between a free man and a slave, or between two slaves.³ Through the civil law, it produced all the effects arising from the natural law.

By an incestuous marriage is understood every marriage contracted contrary to the laws, which was punished by the confiscation of the *dos*.

"The incestuous marriage," says Paulus, "has no *dos*; this is because all gifts, even property acquired by increase, shall be confiscated. So the *dos* having escheated to the treasury on

2. The Romans did not recognize either actions in nullity of marriage or the distinction between destructive and prohibitive impediments. (Ch. Lefebvre, *Leçons d'introduction générale à l'histoire du droit matrimonial français*, p. 100.)

3. Édouard Cuq, *Les Institutions juridiques des Romains*, v. II, p. 90 et seq.

account of an illicit marriage, the husband was bound to pay to the treasury everything he would have been bound to return in the action of the *dos* except the necessary expenses which are ordinarily incurred on the same."

The Emperors Arcadius and Honorius confirmed these penalties to which they added others. They legislated that in such case the spouses should not make each other any gift and should not dispose by will except in favor of their children or of their ascendants, and in collateral line except in favor of their brothers, sisters, uncles or aunts. The Emperor Antoninus Pius says in a rescript: "If a senator has married a freed-woman, who, deceiving him, described herself as free-born, there should be granted to him against this woman an action analogous to a pretorian action, because the *dos* being null, there ought to be for her no advantage whatever." This is in accordance with the rescript of Valentinian, Theodosius and Arcadius.⁴

Whoever marries a relative in the direct line renders himself guilty of incest, according to the *jus gentium*.

Anyone who marries a relative in a collateral line, contrary to an express prohibition of the law, or even a relative by marriage, with whom he is forbidden to marry, is visited with a lighter penalty, if the union was contracted publicly,—with a penalty more severe, if it was clandestine.

The motive for this provision, adds Paulus, is that those who publicly violate the law deserve some indulgence, on account of the ignorance which is attributed to them, whereas those who break the law secretly ought to be considered as refractory and contumacious.⁵

The degrees of relationship are, says Gaius, either in direct line ascending or descending, or in the collateral line. In direct line ascending are the ancestors; in direct line descending, the descendants; in the collateral line, brothers, sisters, and their children.⁶

The direct line ascending or descending commences with the first degree, between father and son; but in the collateral line

4. For more details see Pothier, *Pandectes*, v. VIII, p. 447.

5. *Jure gentium incestum committit, qui ex gradu ascendentium, vel descendantium uxorem duxerit. Qui vero ex latere eam duxerit, quam vetatur, vel ad finem quam impeditur: si quidem palam fecerit, levius; si vero clam hoc commiserit, gravius punitur. Cujus diversitatis illa ratio est circa matrimonium quod ex latere non bene contrahitur: palam delinquentes ut errantes majore poena excusantur: clam committentes, ut contumaces plectuntur.* Paulus, *lib. sing. ad Senatus-consultum Turpilianum*.

6. Gaius, *lib. I, ad edictum provinciale*.

there is no first degree, and it commences at the second, with the brothers.

First cousins are called *sobrini*, and their children *ex sobrinis nati*, having no special designation, take the name of the nearest relatives, and *id est eos qui ex sobrinis nati sunt, inter se proximum nomen appellare*.⁷

There is the sixth and last degree of relationship, which may include four hundred and forty-eight persons.⁸

Anciently, the *paterfamilias* might dissolve the marriage of his son or daughter, *alieni juris* and married *sine manu*. Antoninus Pius directed the magistrates to intervene in persuading the father of the family not to abuse his right. Diocletian finally took a more radical measure, and granted to the husband an interdiction *de uxore exhibenda*, to compel his wife to return to the conjugal domicile.⁹

Progress is now realized by these measures designed to protect married people against the excesses of the *patria potestas*. Paulus exerts himself to justify this blow at the paternal power, invoking once more public interest: "*Contemplatio enim publicae utilitatis privatorum commodis praeferitur*."¹⁰

Already at the time of Plautus, about the year 200, began an agitation in favor of equality of rights between husband and wife. Syria complains in these words: "If a husband has had a clandestine connection with a prostitute, his wife, if she knew of it, has no right of complaint; but if the wife secretly leaves, for a short time, her husband's house, he can bring against her an action for divorce. Why this inequality in the law?" (*Plauti Mercat.* iv, 6.)

In surveying the emancipation of the Roman wife, we find an evolution due to progress of manners and customs, to new ideas generally.

At last, free marriage leads to a wife being entirely independent from her husband; she does not become a member of his family, although having abandoned her own; the only tie between both parties is simply cohabitation.¹¹ In former times the tie was too strict, now it is relaxed beyond measure. It was re-

7. Paulus, *lib. sing.*, de *Gradibus*, § 18.

8. Pothier, *Pandectes*, v. XV, p. 387.

9. É. Cuq, *op. citat.*, v. II, p. 98.

10. Ch. Lefebvre, *op. citat.*, p. 158.

11. d'Olivecrona, *Précis historique de l'Origine et du Développement de la Communauté des biens entre époux*. *Revue historique de droit français et étranger*, v. II, 1865, p. 184; Ginoulhiac, *Histoire du régime dotal*, pp. 53-65; De Fresquet, *De la manus en droit français et étranger*, pp. 142-143.

served to Christianity to find the true principles of union between husband and wife, equally removed from the rigor of ancient Roman society, and from a later excessive relaxation.

I. JUSTAE NUPTIAE.

In ancient Rome, legal marriage was a solemn rite having its particular forms; *confarreatio*, a religious ceremony, *coemptio*, a purely civil ceremony. But these ceremonies which had constituted at the beginning the forms of marriage itself, served later only to acquire the *manus*, and the *justae nuptiae* might take place without them.¹²

When Christian ideas began to prevail, marriage was the least formal of contracts. There was ordinarily a nuptial ceremony, some rejoicings (*nuptiarum festivitas*), a promenade in public with music and singing (*deductio puellae in domum mariti*), sacrifices and prayers. But these public ceremonies were not essential to the validity of the contract; the law was regardless of the form and the celebration; custom supplied them. The marriage (*nuptiae*) was *justae*, that is, regulated by law only as to its effects and to the capacity of the parties.¹³

At Rome, marriage remained a private legal ceremony, and the efforts of the imperial power to transform it into a public one would have doubtless remained vain, had the Christian church not taken upon itself the task of regulating matrimonial law. One must proceed to the time of Justinian to find, in the civil law, Christian ceremonies, and then it is by way of a suggestive rather than an imperative manner.

In modern law, the peculiar character of marriage, which distinguishes it from concubinage, is its obligatory tie, its indissolubility; a union which is not made with the intent to be dissolved at the free will of the parties; from its nature, it is the voluntary union for life of one man and one woman to the exclusion of all others. (*Hyde v. Hyde*, 4 Swab. and Trist. 80.)

At Rome, no one married to procure a faithful wife; divorce being free, it took place without procedure, without judgment, by mutual consent; it might even become effective under the name of *repudium* by the will of one party alone. The *justae nuptiae* were as fragile as the *concubinatus*.¹⁴

12. See É. Stocquart *Aperçu de l'Évolution juridique du Mariage*, v. I, pp. 11-16.

13. *Nuptiae* comes from the custom which brides observed of veiling themselves when they were brought to the groom: "*Solebant enim veteres sponsas, quas adducebat, sponso, pudoris gratia obnubere.*"

14. Planiol, v. I., pp. 242 (4th edit.); Gide, *Étude sur la condition privée de la femme*, p. 551. (2nd edit.)

Paganism did not have as elevated a conception of matrimony as Christianity; if polygamy was prohibited, nevertheless concubinage was indulged and permitted.¹⁵

Marriage was indissoluble, in the sense only that one could not contract it for a certain number of days or years, within terms of cancellation and rescision. The rigid manners of the ancient Romans had, it is true, sanctioned the indissolubility of marriage much more than the law, and it is this which has led certain authors to hold that, in the first centuries of Rome, marriage was indissoluble.¹⁶

The union seems to have had a double object, first, to establish between husband and wife, perfect equality of rank, of condition and of dignity, *honor, dignitas*; ¹⁷ it is this which distinguishes it precisely from *concubinatus*, called as well *inaequale conjugium*. "*Ubi tu Gaius, ego Gaia*," says the wife, in passing over the threshold of the conjugal home. From this act, she entered into the family of her husband, where she became *materfamilias*; she left the domestic gods under which she was born to adopt the worship of the gods of her husband.

Another object of Roman marriage, the most important, was the propagation of the species; hence the well-known formula: *uxorem ducere liberorum quaerendorum gratia*. To become a father, seemed to the Romans the motive and justification of marriage; it was a public and a sacred duty.¹⁸ However they did not consider marriage as the fundamental basis of the family, it was only a secondary regulation.¹⁹

If Cicero affirms *prima societas in conjugio est*, adding that marriage is the source of the Roman State, and, as it were, the nursery of the Republic,²⁰ it is not less true that the Roman family did *not* find its basis either in blood or in nature, it took

15. Concubinage seems to have passed from the customs of the Greeks into those of the Romans. (Zachariae, *Histoire du Droit privé gréco-romain*. *Revue historique de droit*, v. II., 1865, p. 562.)

16. See on this point, Picot, *Du mariage romain, chrétien et français, considéré sous le rapport de l'histoire de la philosophie, de la religion et des institutions anciennes et modernes*, pp. 36-93.

17. Otto Karlowa, *Römische Rechtsgeschichte*, v. II., p. 181 (Leipzig, 1892); Planiol, v. III., p. 2; C. Schmidt, *Essai historique sur la société civile dans le monde romain et sur sa transformation par le christianisme*, p. 33.

18. De Richécour, *Essai sur l'Histoire de la Législation des formes requises pour la validité du mariage*, p. 8 (Paris, 1856), Gide, p. 170.

19. Ch. Lefebvre, *op. citat.*, p. 46.

20. Cicero, *De Officiis* (Book I., 17): "*Prima societas in ipso conjugio deinde una domus, communia omnia. Id autem est principium urbis, et quasi seminarium reipublicae.*" On the value of this work of Cicero, G. Ferrero, *Grandeur et décadence de Rome*, v. III., pp. 134 et seq. (2nd edit.

its origin and its existence in the artificial tie of the *patria potestas*.

This prevailing source of the *patria potestas* led the Romans to establish two systems of *justae nuptiae*:

(a) The marriage *cum manu*.

(b) The marriage *sine manu*.

These two kinds of conjugal unions coexisted during several centuries, down to the early Empire.

Hence two kinds of lawful wives:

First, The *materfamilias*, who becomes a member of the new family, but only so far as she breaks all her former ties.

Second, The *matrona*, who, remaining a member of her own family, retains her gods, her own property, merely leaving her father or her agnates.²¹

(a) Marriage *cum Manu*.

This is the only marriage in which ceremonial formalities, being a legal requisite, were employed; *confarreatio* and *coemptio*. To these two kinds we should add *usus*. "*Olim tribus modis in manum conveniebant*," says Gaius (i, 3), "*usu, farreo, coemptione*." Through these forms of marriage, the woman entered into the family of the husband, and was submitted to a power, existing under the name of *manus*, which ought not however to be confounded with the modern marital power. In reality, this power pertained entirely at first to the father of the husband, and did not come to the husband himself, until he became head of the family and able to enjoy at the same time the *potestas* of his children. The wife became, by the civil law, daughter of her husband; she entered into his family, as agnate and as cognate: *In familiam viri transibat, filiaeque locum obtinebat*. (Gaius, i, 3.)

Here is an extraordinary juridical status,—the wife is represented as daughter of her husband and sister of her own children.

Let us add that the wife *in manu* had no right to divorce her husband, in case of marriage by *confarreatio* or *coemptio*; but, when married *solo consensu*, she was entitled to send the bill of repudiation.²²

"This severity of law," says Troplong, "did not hinder the customs from making kind husbands, and scolding and wilful wives. In the comedy of *Casina*, Plautus introduces in a scene a jealous wife, who overwhelms her husband with reproaches and invectives." (Act II, Scene III.)

21. Troplong, *Du Contrat de mariage*, v. I., p. 13 (Paris, 1850).

22. Pothier, *Pandectes*, v. IX., p. 163.

Here then, is an institution which attracts the attention by its characteristic of great rigor. The husband becomes the judge of the wife, he may alone, in the earlier times, later, in a domestic tribunal where his relatives are called, condemn her to death. He is master of her person and of her property, almost, as if conquest had put her into his hands; terrible reminiscence of the rape of the Sabine virgins.²³

(b) Marriage *sine Manu*.

This is the reaction, but excessive in its turn, against the severe exaggeration of the *manus*. Disagreeable experiences early befell the lot of women placed in absolute dependence. Their eyes were opened to the inconvenience of this position, and ingenuity was displayed to preserve the wife against this absorption and this abuse of power in the family of the husband. The text of the XII Tables, which anticipates the means of interrupting the *usus* in order to avoid the *manus* itself, seems to fully prove that then already began the new practice in opposition to the *justae nuptiae*.²⁴

So, in the earliest times, there were some *patres*, who, from paternal foresight and love, and some probably from selfishness, were desirous to avoid the *manus*, in order to keep their daughters under their *potestas* and their protection. From that time, the father entrusts his daughter to the husband only, retaining over her all his rights as head of the family, and consequently excluding all other ties.

The wife did not pass into the family of the husband; she retained entire her original *agnatio* and through it, her hereditary rights along with her own relatives; in other words, the wife remained independent from her husband and kept her own property. The latter had the burden and the expense of keeping his own family. He often received from his wife directly or through a third person, certain gifts and donations to keep up the establishment, and reciprocally certain rights might be vested in the wife. (*propter nuptias donatio*.)

But, even when the wife lost her own father, these *justae nuptiae sine manu* did not transform themselves into a conjugal association. Freed from the *potestas* and *sui juris*, the wife was released from all domestic authority. It is true that during a long time she remained toward her own family in a sort of secondary dependence, a kind of nonage of her agnates.

23. Troplong, *De l'Influence du Christianisme sur le droit civil des Romains*, p. 18. (Nouv. edit., par l'Abbé Bayle.)

24. Ch. Lefebvre, p. 70.

Gradually this nonage was weakened and disappeared by the working of new customs; the wife became too independent. Here is the cause of the loose morals of the day. Nothing was left of the rigid system ruling ancient Romans, except the *dos* to which they added later, the prohibition of gifts between husband and wife.

(c) Ceremonies.

It is necessary to make clear the distinction between the obligatory ceremonies, legal formalities, and the ceremonies both religious and familiar, arising from custom, and I might say, almost from fashion. If we should confine ourselves to the texts we might imagine, easily, that the only formality of a marriage *solo consensu*, is an agreement, carefully drawn up between the fathers of the young people, with *datio* or *dictio dotis*. But in fact the betrothal had ordinarily preceded, accompanied by numerous presents, the feasts and the ceremonies both religious and family, completed by the *deductio in domum mariti*. For these usages, we have to read and peruse the books of authors who have dealt with the customs and private life of the Romans, and not legal works.²⁵

Usually the *nuptiae* went on for three days. The second day was devoted to the signature of the dotal contract, and the *dos* itself was deposited in a temple, or sometimes in the hands of a priest, from whence it was reclaimed by the husband the day following the ceremonies. The third day the *deductio* took place, ordinarily after the setting of the sun and by the light of torches. The future wife was brought by her relatives to the house of the husband, where she received fire and water as a symbol of her new position.

Later, between Christians, a religious ceremony, often the nuptial benediction, came to be added to the ceremony at the conclusion of the civil contract.²⁶

The Romans believed that not all days were favorable for the celebration of a marriage. They abstained from marrying on feast days, also on those days which a decree of the pontiff had declared unlucky days, such as the *Kalends*, the *Nones*, the *Ides*. The anniversaries of funerals of ancestors, the *dies parentales*, which were ordinarily celebrated in the month of February, appeared to them unpropitious, they were considered as unlucky or

25. Ch. Lefebvre, *op. citat.*, p. 308.

26. Troplong, *De l'Influence du Christianisme sur le droit civil des Romains*, p. 229; J. M. Antequera, *Historia de la legislación española*, p. 16 (4th edit.).

of bad omen. The month of May was equally considered an unlucky time. It was a common proverb, *mense malas maio nubere vulgus ait*, bad marriages are made in the month of May. The time considered auspicious, favorable, was after the *Ides* of June. As the *auspices* were consulted, the hair of the bride was adorned with garlands of flowers and with a spear. This custom of adorning the hair of the bride was an ancient custom, after the Vestals who bore this ornament, and supposed to be the privilege of a pure and chaste wife. Finally the bride was arrayed in a tunic of soft wool and covered with a veil of reddish color, *flammeum*, hiding her figure. When the evening came three children took her to the husband's house. At the door, which was decorated with branches of trees, she was asked what her name was. She replied that she was called *Gaia*. This name came, it appears, from the wife of Tarquinius, who was so virtuous that new wives all took her name, as being of good omen; they were accustomed to utter this ceremonious formula: "*Ubi tu Gaius, ego Gaia*," which signifies: where you shall be master and *paterfamilias*, I will be mistress and *materfamilias*. Then she adorned the door of the house with streamers of wool, after first anointing it with oil.²⁷

This anointing once made, the bride entered into the house, but she had to take care not to touch her feet to the threshold of the door. She leaped over, or her companions willingly helped her to enter, by carrying her, not always through the door, but sometimes through an opening purposely made in the wall.

Once entered, she was given the keys of the house, she was placed on a sheepskin, and her husband received her for his wife in presenting to her water and fire; the water having been drawn from a pure source by a child of either sex; he sprinkled his bride with this water. Then five conjugal torches were lighted. The new husband gave a feast to the new wife and her companions. They called it the feast of rejoicing, *epulae geniales*. They sang and shouted *thalassio*, during which the conjugal bed was prepared in the chamber of the husband, the good spirit of which was invoked. The newly married couple were conducted thither, preceded by a torch which it was the custom for the friends of the newly married couple to take away with them. At the same time were borne the figures of several gods, in order that the marriage might be fortunate. Near the conjugal bed was a sort of tapestry suspended, consecrated to Priapus, rising by degrees, orna-

27. This in Latin is called *inungebat*; from it comes the word *uxores*, as one might say *unexores*, those who receive the anointing (unction).

mented in ivory. The new wife went to sit there an instant to do homage of her virtue to this god. Then women companions placed her in the conjugal bed. They were women of recognized chastity, who had been married but once. Finally the husband detached the virginal girdle, the band of wool which the bride had worn up to this time.²⁸

The day following the nuptials a new feast was given, and that day was called *repotia*, because they began anew to drink. On this day the new wife exercised the authority of mistress of the house, performed some religious ceremonies, and received presents from her relatives and friends.

(d) Second Marriages.

As we have already said, neither the pomp of the nuptials, nor cohabitation, was essential to a valid marriage.²⁹ However, between persons of superior rank, a contract was indispensable for entering upon the *justae nuptiae*.

As to second marriages, Augustus encouraged them, although punishing with infamy the widow who contracted new bonds within the ten months following the decease of her husband.³⁰ The reason of this prohibition was, following the forceful expression of Ulpian *propter turbationem sanguinis*, in order that confusion of blood should be prevented, and all the uncertainty resulting therefrom; but the widow might betroth herself during this period.

When Christianity arose, it did not condemn second marriages. St. Paul even advised them to young widows.³¹

Theodosius the Great, induced in this by the bishops assembled at the Council of Constantinople, extended the delay of ten months to a year, confirmed the penalty of infamy, but added thereto a new sanction, more efficacious. The woman lost the gains of her former marriage, she was not able henceforth to give to her second husband more than a third of her property, and became incapable of being the heir to the property of a stranger or a relative beyond the third degree. (C. 5, 9, *de secundis nuptiis*, l. 1.)

28. When the marriage was made by *coemptio*, there were other particular ceremonies, well known. See Karlowa, *op. citat.*, Vol. II., p. 158.

29. Pothier, *Pandectes*, v. VIII., p. 383.

30. The year was originally of ten months among the Romans. Numa increased it by two months, but the time of mourning was not prolonged to the same period.

31. Troplong, p. 184.

The property constituting the gifts and profits of the former union was irrevocably assigned with a hypothecary lien, to the children of the former marriage, saving the right of usufruct in favor of the mother. Theodosius II and Valentinian II extended these provisions to the father who remarried.

Paulus informs us what was meant by mourning. "He who is in mourning, ought to abstain from feasts, from all rejoicings likewise from wearing purple and white colors." (*Sent.* §14.) However, in order to assist at funerals, the women were dressed in white, this color harmonizing with this ceremony, and used to enshroud the dead; but they afterwards resumed their black clothing.

The death of a betrothed carried no obligation to mourning, *sponsi nullus luctus est*, says Paulus.

By a constitution of Valentinian, of Valens and of Grattan, "a widow of less than twenty-five years of age, although emancipated, might not contract a second marriage without the consent of her father." (Cod. 5. 4, 18.)

By the same constitution, an adult minor after the death of his father married with the consent of his mother and his near kinsmen. (Cod. Theod., 3, 7, *de nuptiis*.)

"And if, on the choice of a husband, the mother does not agree with the near kinsmen, it is decided that (conformably to that which has been established for the marriage of daughters) to authorize the choice, he must have recourse to judicial authority; so that in a case where the competitors were both of the same birth and the same merit, the judge shall give the preference to the one to whom the mother had given consent."

"And finally, in order that the nearest heir of the widow might not oppose an honorable marriage, if there was any suspicion in this regard, we decree that the authorization and the decision shall be submitted to those who are called to intervene in their default and who cannot be heirs." (Cod. 5, 4, 18.)

Honorius and Theodosius alike say, "Maidens consecrated to the divine service cannot marry at all without the consent of their fathers, nor a girl who has the free exercise of her rights, unless over twenty-five years of age. If she no longer has a father whose consent is required, she shall have to apply to her mother or a next of kin; but in case of death of her father and mother, and her kinsfolk, the judge will decide who is a suitable husband." (Cod. 5, 4, 20.)

According to the opinion of Professor Charles Lefebvre, the *iustae nuptiae* may be considered as one of the most imperfect in-

stitutions of classic law, an error made by the Romans in their conception of the true notion of the relation between husband and wife. (Lefebvre, p. 169.)

2. MATRIMONIUM JURIS GENTIUM.

A legal marriage could not be contracted except between Roman citizens enjoying the rights of *connubium*. However, the inevitable and necessary intercourse with the *peregrini* compelled the Romans to regulate unions with some other persons. Such a marriage was not a *justum matrimonium*, but neither was it a concubinage. They called it *matrimonium injustum, non legitimum*, or *matrimonium juris gentium*.

Children of such a union had a recognized father in the legal sense of the word. Nevertheless, they were not *justi liberi* and they followed, in virtue of understood principles, the condition of the mother. So a *peregrina* mother gave birth to *peregrini* children; if, on the contrary, she was a Roman citizen, her children became Roman citizens.³²

From the time of Caracalla, there was no more question of a marriage *juris gentium*. Every valid marriage constituted a civil marriage *justae nuptiae*, a *justum matrimonium*.³³

At the time of the Romans, the inhabitants of a country conquered by arms and converted into a province, such as Spain, were called *Provinciales*; they did not participate in any of the privileges of the citizen; they had neither the *connubium* nor the paternal power, nor the honors, nor the priesthood, nor the suffrage. They were subject to Roman officers who had to rule them and to apply the provincial edicts.³⁴

In 212 Antoninus Caracalla virtually extended the quality of Roman citizen to all inhabitants of the Empire; this abrogated the Latin right. This step was taken in the interest of the Treasury,

32. Gaius, I., 56, 67, 80; Ulpian V. 8, 9.

33. Mainz, *Cours de droit romain*, §303.

34. The *ingenui* or free-born men who lived in Rome were Roman citizens; the others, non-citizens or *peregrini*. These were subdivided into *Latini*, *Italici*, *Provinciales*.

Roman citizens had particular rights, notably the *connubium*, the paternal power, the honors, the priesthood, the suffrage.

The *Latini* were anciently the inhabitants of *Latium*, and related to the Roman people. The principal of those rights was to be ruled by their own laws and their own magistrates. They might become Roman citizens.

The rights of the Italians were also given to some cities outside of Italy. The Italians had likewise their own magistrates and their own laws, but they could not possibly become Roman citizens.

Vespasian gave the Latin right to all Spain; *Universae Hispaniae Vespasianus imperator Augustus jactatum procellis reipublicae Latium primum*. (Pliny, *Hist. Nat.* III., c. 3, 30.)

and in no way moved by a liberal mind as one might believe; it gave an opportunity to lay a tax of five per cent on any succession whatever.

"*In orbe Romano qui sunt, cives Romani sunt*," writes Ulpian, "all those who live in the Roman empire are Roman citizens."

We remark, however, that the edict of Caracalla was not a general and universal law. The act only applied to the free-born. The Latin right continued to exist for all classes of the *Latini Juniani* down to the reign of Justinian. It was furthermore incompatible with the quality of Roman citizen, as every inferior condition is incompatible with the condition of a superior order. The edict excluded equally the barbarian mercenaries serving in the Roman armies, and the inhabitants of provinces conquered subsequently to its publication.³⁵

As we have already said, marriages were strictly prohibited between the Roman official exercising a charge in a province, and the provincial who had her domicile there. An exception was made, however, in favor of an officer who served in his own country.

3. CONCUBINATUS.

With regard to marriage, the law separated wives into two classes; on the one side the *matrona* or *materfamilias*; on the other side, wives to whom that title was refused, those whom Horace called *in classe secunda*. (Satires i, ii, v. 94.)

In juridical language, the words *matrona* or *materfamilias* had a clear and precise meaning, exacting a two-fold condition for the wife; first, to have had a Roman citizen for a father; second, to have maintained an honorable and pure life, the dignity which her origin gave to her.

From that time, the Roman wife had the right to wear the white tunic with the long fold, the *stola*, the noble sign of the matron, as the *toga* is the noble sign of the Roman *quiris*.³⁶ A veritable sacrilege was committed if this wife or virgin fell short in her duties and

35. Girard, p. 115 (4th edit.).

Ch. Mainz, *Cours de droit romain*, §54; Ch. Revillout, *Étude critique sur le jus italicum*. (*Revue historique de droit*, 1855, v. I., pp. 541-571.)

36. In early times women as well as men wore the *toga*, but later adopted a different robe called the *stola*, which was decorated with a wide border or fringe, *limbus*, which they called *instita*, which came down to the feet, from which the word *instita* is used for *matrona*. Over this garment they put another ample robe, similar to a mantle, which they called *palla* or *peplus*. The ancient interpretations of Horace attributed the same signification to the words *palla* and *instita*, and called the garment *peripodium* and *tunicae pallium*.

It was prohibited to courtesans and to women condemned for adultery to wear the *stola*. (A. Adam, *Roman Antiquities*, v. II., p. 216, trad. Paris, 1818.)

sullied the sanctuary of her family. So, for her, concubinage was severely prohibited; it constituted a crime, a *stuprum*; while as to a woman of inferior class it was an indifferent fact in the eyes of the law. From this time, the demarcation between the caste of *matronae* and the inferior class does not give rise to any confusion.

In this second class were found all Roman women who had not Roman citizens for fathers; the slaves, the freed-women, perhaps also foreign women; finally those born of an irregular union and who had no legal father.

The law established also a very clear distinction between the *concubinatus*, the *justae nuptiae*, and the encroachment on the morals, the *stuprum*.³⁷ In ancient Rome, no sexual intercourse, except between husband and wife was allowed by law, except later between concubines: *stuprum committit, qui liberam mulierem consuetudinis causa, non matrimonii continet, excepta videlicet concubina.*" (Modestinus, Dig. 48, 5, 35.)³⁹

No legal distinction separated a married woman from a concubine,—intent alone—yet in reality and in the course of daily life, the *uxor* and the concubine had no resemblance whatever, nor could they be easily confused. The distinction, wrote Paul Gide, seems as clear, as sharp-cut, in Roman society, perhaps, as it is in our days.

The constant publicity, really resulting from the *affectio maritalis*, from the *dignitas*, from the possession of this status, in a word, was sufficient for the Romans.³⁸

The *justae nuptiae*, were, at Rome and in Italy, nothing but the marriage of a part of the population, of that which one might well call in our day the better class, the higher and ruling classes. The *connubium* was, however, not generally conceded in all the Empire, outside of the *cives Romani*. The *nuptiae* were for the few, and they remained forbidden between free-born and freed persons. Hence arose *concubinatus*; it was an earnest and acknowledged intercourse. In opposition to the *justae nuptiae*, there was no *dos*, neither any *potestas* over the children.⁴⁰

37. P. Gide, pp. 554, 557.

38. P. Gide, p. 552; Otto Karlowa, *Römische Rechtsgeschichte*, V. II., p. 181; Planiol, v. III., p. 2.

39. Such was also, from 1665, the law of the colony of New York: "Every single person or persons who shall be found, or proved by confession of parties on sufficient testimony, to have committed Carnall Copulation, with a married man or woman, they both shall be grievously fined, and punisht as the Governor & Council or the Court of Assizes shall think meete, not extending to Life or Member." (*The Colonial Laws of New York*, v. I., p. 21.)

40. Free marriage did not require any legal formality except a reciprocal consent. It encroached on the limits of concubinage. This reason gave place to the *dos* to distinguish the lawful wife from the concubine, but it is

This is why Plautus says in one of his comedies, the *Trinummus*, that it would be indecent for the head of a family to marry off his daughter or his sister without a *dos*, even to one who would not object to marry her so, because such a union savored rather of concubinage.⁴¹

The wife was distinguished from the concubine by the intention of the parties, *concubina ab uxore, solo dilectu separatur*.⁴² This intent was shown either by an express declaration, or by the social condition of the couple. If, for instance, it concerned a free-born and honorable woman, she was reputed a wife, unless, by a formal declaration, the man had made known his intention to take her for a concubine. The will of the parties, or of one of them, put an end to the concubinage.⁴³

The conditions of concubinage are puberty, consent of the parties and of the ascendant under the power of whom the man or the woman might happen to be.

We know of the restriction put by Antoninus Pius upon the power of the father sending the *repudium* contrary to the will of the parties.

As the father had power to dissolve concubinage, it has been assumed that he likewise had power to prevent its formation.⁴⁴

There were a certain number of rules in common with marriage, notably the impediments based on relationship, affinity, and finally, on the conditions of morality itself. So a man who had been in a status of concubinage or of marriage with a woman, could not, after having left her, unite with a daughter of that woman by a second union. But, on the other hand, if a man and a woman, having, the one a son, and the other a daughter, of former unions, coming to marry, the union of the son of the one with the daughter of the other was not prohibited, even though there should be born of the second marriage of their respective parents, a child, who would be the brother of each of them.

An interest, wholly political, caused the prohibition to officials to marry a woman domiciled or born in the province where they exercised their functions. This prohibition seemed to prevent them from

not to be concluded that it was one of the essential elements in the formation of the marriage. (Troplong, *Du Contrat de mariage*, v. I., p. xx,) (1850.)

41. Plautus, *Trinummus*, Act II., sc. 2, v. 93, 94.

42. Paulus, *Sentent.* lib. II., 20.

43. L. Domenget, *Institutes de Gaius*, p. 42 (nouv. édit.). On the controversy that the *matrimonium*, like the concubinage, required for its formation something other than consent, see Morillot, *De la condition des enfants nés hors mariage*, p. 70.

44. Paulus, *Sentent.* lib. V., tit. 6, 15—on the question, see Pilette, p. 322.

procuring in their provinces, by marriage, an influence from which the Capital might one day have to suffer, and to prevent the abuse which they might have made of their authority to compel rich families to ally with them. Nothing of the kind was to be feared if it was only a concubinage. The concubine had no *dos*; she belonged ordinarily to a family of mediocre condition, without influence in the country; and if, by accident, she belonged to a family of note, her relatives, little flattered by the attentions of the official, would not become very ardent partisans for him. This is why a fragment of the title *de concubinis* in the *Digest* formally granted to officials of a province their right to take a concubine.

It was forbidden to have several concubines at once; this would have been polygamy, contrary to Roman civilization. Likewise a man having a lawful wife, could not take a concubine; this would have been adultery and bigamy. If any audacious debauchee violated this law, public morality protested against such turpitude.

Tacitus reproaches Sophronius Tigellinus, commander of the night watch of Nero and of the Pretorians, with his infamous death in the midst of the embraces and kisses of his concubines. "He cut his throat and crowned the opprobrium of his life," wrote he, "by the tardiness and the ignominy of his death."⁴⁵

Among illegitimate children, there were *naturales*, children born of a concubine; *spurii*, children born of a *meretrice*, *vel scorto et incerto patre*; children of an adulterous intercourse; and, finally, children of an incestuous intercourse, such, for instance, as the child of uncle and niece or the child of a union contracted with a Vestal.

Children of concubinage (*nothi*) were not bastards, but although they had a known father, they were not his lawful children. Born outside of marriage, they could not claim the advantages of the civil law; they could not succeed to their father, they did not bear his name, they were not members of his family. But, regarding the mother, they had the same rights of succession as legitimate children. Such was the logical consequence of the position assigned to the mother in the Roman family; there was no connection between her and the legitimate children except by ties of blood. There was nothing between them and her except a natural relationship, entirely similar to that of natural children. Beyond this, there could not exist any difference between a child of concubinage and one born of lawful marriage.⁴⁶

45. Tacitus, *Hist. lib. I.*, Cap. LXXII.

46. Troplong, *op. citat.* p. 174.

It goes without saying, that children, issue of concubinage, did not receive the *jus liberorum* except as to their father and mother, for the peremptory reason that in the eyes of the law they had neither paternal nor maternal grandparents. For them, the family commenced at their father and mother; they could not, therefore, procure the right resulting from their birth except from their immediate parents.

(a.) NATURE OF THE INSTITUTION.

According to M. Planiol, the usual view of considering the *concubinatus* as a kind of inferior marriage, loses ground daily, which confirms the opinion of the late Professor Gide. Many authors presumed the *concubinatus* formed a legal tie giving rise to certain legal effects; they invoked the following sentence of Ulpianus; "*Etiam si concubinam quis habuerit sororis filia, licet libertinam, incestum committitur*" (*Digest* 23, 2, 56). "But," says M. Girard, "neither during the Empire, nor before, was the *concubinatus* a kind of a marriage; it was nothing else but a mere cohabitation. What leads to confusion, is the *lex Julia de adulteriis*, where adultery or the sexual intercourse with an honest woman were punished as *stuprum*, while the concubines escape all penalties." The words of Ulpian are evidence that from the time of Augustus, the institution was recognized by criminal law, and nothing more. From the time of Christian emperors it was known to civil law. (P. F. Girard, p. 183.)

(b.) LAWS OF AUGUSTUS.

Before Augustus, sexual intercourse, out of marriage, was either a *stuprum*, or a mere *fornicatio*, according to the woman; but from his time, concubinage did not involve any disgrace and the concubines escaped penalties.

Yet the concubine had no right to the honorable title of *materfamilias*; she did not participate in the honors of her husband, only sharing his bed, his table, and his affections; in former times described as *concubina*, she took now the more decent name of *amica*, a friend.⁴⁷

Some men raised monuments to concubines, on which were inscribed their quality, without offending public sentiment; it happened even that on the same marble were inscribed the names of a wife, and then of a concubine who had taken her place.⁴⁸

47. "*Nunc vero nomine amicam, paulo honestiore, concubinam appellari.*" Paulus, *Dig.* 50, 16, 144.

48. "*Concubina mei amantissima.*" Gruterus. *Inscriptiones antiquae* v. I., pp. 631, No. 5; 640, No. 8. (Amst. 1707, in fol.)

Gradually concubinage acquired a great extension; it especially served to throw the cloak of decency on loose unions of free and honorable Romans, who had no desire to be involved in too heavy ties. Often, after the death of his first wife, a widower chose an *amica*, in order to escape from burdens of a second marriage.

Poor plebeian women of obscure birth, freed slaves, were willing to live, under the name of concubine, in the company of a man desirous to avoid a *mésalliance*. During the whole Empire, most honorable men, emperors renowned for their virtue, lived publicly and openly in unions of this kind. The learned and virtuous Marcus Aurelius had a celebrated concubine; after the death of Faustina, in order not to give a step-mother to his children, he took for concubine the daughter of the procurator of the deceased empress. Another emperor, Vespasianus, having survived his wife and his daughter, kept as a concubine Caenis, a freed-woman.

The church, rigorous and inflexible with regard to heresies, and to sects which might compromise her supremacy, proved to be tolerant and moderate towards certain social institutions. Its leaders saw and realized the impossibility of transforming them too suddenly.

A Roman citizen had returned from Spain, leaving in that province a wife *enceinte*. He married again at Rome, and died, leaving two posthumous children, of the two marriages. The status of the second woman and of her child was contested. The question was raised whether, in order to break the first marriage a formal divorce was necessary, at least, a change of will and intention regularly manifested in a certain form of words (*certis quibusdam verbis*), and not merely the change of intention shown by the fact alone of the second marriage. It was on this occasion that Cicero remarked that if this question was adjudged against the second woman, she could not be treated otherwise than as a concubine, *in concubinae locum deduceretur*.⁴⁹

The *jurisconsult* Marcianus thus had reason to say, "it is from the laws of Augustus that concubinage has received a name and a legal position, *concubinatum nomen per leges adsumpsisse*." (Dig. 25, 7, 3.)

Ancient usage did not permit a Roman citizen to espouse a freed-woman. (*Tit. Liv.* xxxix, 19.) So Cicero twitted Antony for being married to Fulvia, daughter of a freedman (*Plin.* ii, 2, iii, 6); and Antony was generally detested on account of his marriage with Cleopatra, a foreign queen, whom he married after the death

49. Cicero, *De Oratore*, lib. I., Cap. XL.

of Fulvia and a short time before he united himself with Octavia. (Plutarch, in *Antonio*.)

The concubinage of the patron and his freed-woman was perfectly permissible. It was proper, they said, that he should make her his concubine rather than his *uxor*. But having become the spouse of her patron, the freed-woman could not leave him against his will, and if we are to credit Ulpian, she lost the right to be the concubine of another man.

A Roman citizen is guilty of *stuprum*, if he takes for concubine a free-born woman, who has remained virtuous and of whom he has not the *testatio* constitutive for her abasement. From necessity, Romans were inclined rather to hold to a *stuprum* than to a concubinage, when it was a question of a Roman woman and a man of inferior condition. The patrician woman who satisfied a caprice in abandoning herself for a time to any plebeian youth, was not considered as his concubine; she was less blamed than if she had become such.⁵⁰

A senator could not marry, but might have for a concubine, a freed-woman, a woman whose parents appeared on the stage, a prostitute. A free-born man might unite in concubinage with an adulteress or a woman condemned by a public judgment, with an actress, or any other woman whom he could not have made *uxor*, on account of the humbleness or the disgrace of her condition.

The concubine was placed by the civil law immediately after the *uxor*; it was an unequal marriage which one might perhaps liken to the morganatic marriages practiced in Germany.

In *résumé*, there was nothing of disgrace or of infamy in the status of concubine, but as generally the man took a concubine from a class inferior to his own and did not raise her to his rank, less consideration was naturally had for this woman than for an *uxor*. Like the latter, she lived in the conjugal domicile, she was mistress of the house, but outside, the similarity went no further; the concubine never shared the honors nor the dignities of the man with whom she lived.

So, to take a concubine was an act which, even at Rome, one did not celebrate, because it was a sort of *mésalliance* or libertinage, and because for the outside world, the concubine was not a wife but nearly a servant. What constituted the status of *concubinatus*, was cohabitation by mutual consent.⁵¹ At the beginning it was very easy to distinguish the concubine from the wife, on account of the cere-

50. D. Pilette, *le Concubinat chez les Romains* (*Rev. hist. de droit français*, v. XII., pp. 329, 339).

monies which inaugurated conjugal life, and also because the concubine was always of an inferior social condition; often a female member of a *familia*, who was raised above the others. Whenever the public formalities were no longer customary for marriage, when Christianity had prohibited them like all the rest of the pagan worship, and when finally concubines were chosen amongst those whom they might have taken for wives, and inversely, it was no easy matter to make the legal distinction. The difference was even sometimes impossible to establish, since the same woman might change her quality without any public manifestation. The concubine and the wife are no longer distinguished, except by the intention with which they commenced their union.

(c.) LAWS OF CONSTANTINE.

The doctrines of Christianity did not allow that a man should subject to a humiliating inferiority the woman whom he had chosen for a companion. So all efforts of the Christian emperors tended to do away with the *concubinatus*. Constantine struck the first blow, but, displacing the responsibilities, he struck less those who contracted one of those unions henceforth illegitimate, than the children to be born, who were quite innocent of their parents' faults, and whom he classed with the *spurii*.

Starting from Constantine, concubinage ceases to be a union which the law protects; it is still not illicit, but it is no longer legal.

His successors gave more or less proof of the same inconsistency, the same lack of judgment. His first thought, it seems, was to convert concubinage into legal marriage, and to this end he granted legitimacy to the children born of such unions, and assured to them the same advantages as to children born in lawful wedlock, on condition that their father married his concubine. He created what is called in our days legitimation by subsequent marriage. He prohibited equally to persons high in dignity to live in concubinage. He attacked, in this way, the institution, by the three-fold influence of recompenses, penalties and public example. We note, however, that legitimation did not apply except to children of free-born concubines.

Leo VI, the Philosopher, abolished concubinage. Starting from his Novel 91, the children *ex concubinatu quaesti* and those born of

51. Some authors have held that concubinage did not result from consent alone, and that there had to be in addition the *ductio ad domum*, that is to say that the concubine ought to be put at the disposal of the husband, but this opinion has not prevailed. See, on this point, D. Pilette, *op. citat.*, 244, *et seq.*

criminal unions and of transient unions, are classed together. There are no longer, outside of children born in lawful wedlock, any except those *vulgo concepti*, governed by an unjust law.

Constantine had understood that the abrogation of the law was a necessary preliminary to the regulation of marriage. By suppressing the penalties against unmarried persons, he had substituted for the pagan system the Christian and truly moral system of liberty in marriage. Montesquieu has held that Constantine had no other object than to encourage continence. According to Troplong, the plan of Constantine was more extensive; he desired to attain a double end; to give dignity to a voluntary life of celibacy and to clearly define the matrimonial state.

Thus he overturned from top to bottom the memorable laws which the pagan emperors had considered the basis of their empire.

But all history demonstrates, and to this day has not ceased to demonstrate, that it is not enough for a legislator with good intent, in order to modify the organization of society, to try and wipe out, by simple decree, an institution which, during centuries, has been rooted in daily custom. No one can, by violence, alter the turn of mind and the usages of a people, especially when a legislator takes up daily, universal, familiar things. At this depth nothing can be forced upon society. The attempt meets obstacles of the same nature as violence itself,—physical obstacles of number and of space. The learned author, Dupont White, has remarked: "Force is helpless against ancient manners even when moved by the best intentions and the soundest policies. It is not exactly the law, which is invincible, but opinion, manners and customs." (*L'Individu et L'Etat*, p. xii, 3rd edition.)

Constantine failed to understand that the state can, in no way, give rise to progress of whatever sort, whether imposing or lending its power; the source of progress is elsewhere; we find it in predisposing circumstances, in a collaboration of men and things. Where is its heart and life?

Again, society was still full of paganism, which, neglected as a cult, remained in the manners and customs. Although Christian by faith the people were still pagan by civil and domestic habits. If the emperor himself was converted to Christianity, the great mass of the empire had not followed, yet remaining half pagan.

The gods had disappeared neither from the camps nor from the temples; but without overturning their altars, it was commenced in a careful manner to shut them up in their sanctuaries. The public worship of paganism remained permitted and even honored; to offend it too directly was avoided. Constantine always designated

it by this expression, a little disdainful, but polite: "*Vetus mos, preterita usurpatio*,"—the old custom, the ancient observance. He did not dare to banish entirely the official ceremonies.⁵²

He continued to respect the immunities of the pagan priests; he continued even to preserve the title of the *pontifex maximus*; he perserved it with the insignia on several medals and inscriptions.⁵³ But notwithstanding the free scope given to the pagan religions, he strongly repulsed their immoral rites; he ordered to be demolished in Egypt and in Phœnicia the temples consecrated to an indecent worship, and dispersed by soldiers their infamous priests.⁵⁴

The hesitation of the sons of Constantine concerning this worship (Christianity), shows how much, at the time of his death, the bulk of the people was still thoroughly pagan. Everything is contradictory in their acts, and consequently in the narratives of their historians. One day daring reconstructors, the next day intimidated by the phantom of the ancient institution and by the prejudices which surrounded them; now they advanced, then they receded; sometimes refusing to punish the child for the fault of the father, sometimes tolerating the scandal of concubinage. So, Valentinian I granted to natural children and to their mother the right to receive legacies from their father and husband; on the advice of the pagan Libanius this return to a rightful indulgence, but contrary to the then prevailing Christian doctrine, was also sanctioned by Valens.⁵⁵

Now Valentinian III desired to repeal the law and to go back to the decree of Constantine, but Theodosius II would not accept it, unless with the concession made by Valentinian I. They tried then to preserve sanctity in the conjugal union, at the expense of the illegitimate children.

We may ask what was this invisible force in paganism which, discredited and ignored, continued nevertheless to raise its head above the current of opinion, and the ardent depositaries of an absolute power. It was great and persistent, for it was the force of the past in a society which had seen ten centuries of power and glory. A mixture of popular superstition, of political traditions, of social habits and of literary tastes, defended still against the invasion of new customs, the remains, solid and massive, even though broken, of the old religion. All Roman society was permeated with its mem-

52. de Broglie, *L'Église et l'Empire romain au IV siècle*. v. I, pp 308-309; v. III., pp. 136-138.

53. Mionnet, *De la rareté et du prix des médailles romaines*. Paris, 1827, Vol. II., p. 226.

54. Euseb., *Vita Const.*, III., c. 55 et 58; IV., c. 25, p. 512, 514, 537.

55. *Cod. Theod.* 6, tit. 6, 1.

ories and its beliefs; the popular language, administrative, political or polite, was equally impregnated. The fields, the courts, the schools, abounded still with pagans, avowed or secret. The old tree, struck at the head, had not ceased to extend its strong roots under the soil. As it happens often to the vanquished, even adversity prepared new resources for the last pagans, in binding together their ranks and giving them union in their lack of power. It caused the survival in all ranks of Roman society, of this last feverish agonized excitement which caused it to take on for some time the appearance of resurrection.

In reality, two societies, very different, are present; the civil society and the religious society. As Guizot observed, "They differed not only in their object, but they were governed by different principles and institutions, paganism continuing to impose its laws and its customs."

Polytheism retained its roots in a soil more resisting than that of jurisprudence; it rested not on political morals, but on popular pleasures. This was its last, and for a long time, its inviolable asylum.

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